No. 14581

United States
COURT OF APPEALS
for the Ninth Circuit

CLIFFORD G. MARTIN, Doing Business as Martin Music Company,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

Appeal from the United States District Court for the District of Oregon

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered on August 10, 1954, by the District Court for the District of Oregon awarding the United States the sum of $12,978.10 (Tr. 35). The action was brought by the Government for violation of Ceiling Price Regulation 34 issued by the Office of Price Stabilization pursuant to its authority under the Defense Production Act of 1950. Appellant's Notice of Appeal was filed September 13th, 1954 (Tr. 36). The jurisdiction of this Court is invoked under 28 U.S.C. 1291.

STATEMENT OF THE PLEADINGS

The Appellant, Clifford G. Martin, was sued by the United States of America under the provisions of the Defense Production Act of 1950, as amended, for alleged over-charges in connection with the operation of coin-operated phonographs, commonly referred to as a "juke-box", in the states of Oregon and California.

During the period that the alleged over-charges occurred, the Appellant was engaged in the business of supplying music by means of coin-operated machines in the States of Oregon and California, with his principal office in the City of Grants Pass, County of Josephine, State of Oregon.

During the base period, December 19th, 1950, to January 25, 1951 inclusive, the Appellant charged the sum of Five (5¢) Cents per play to persons to whom he furnished recorded music on his machines.

During the period September 1, 1951 to May 9, 1952 inclusive, the Appellant charged the customers operating his coin-operated music machines the sum of Twenty Five Thousand Nine Hundred Fifty Six and 20/100 ($25,956.20) Dollars in excess of the amount which he would have charged calculated on the price of Five (5¢) Cents per play. Of the amount so received, One-Half (½), or Twelve Thousand Nine Hundred Seventy Eight and 10/100 ($12,978.10) Dollars, was paid to the location owners. From his half of the proceeds, Appellant selected, purchased and supplied all records for the machines and paid all operating expenses incidental to the

operation and service of the machines, except for electric current to operate the phonographs.

The United States of America, as Plaintiff, contended by its pleadings and the Pre-Trial Order that under Ceiling Price Regulation 34 Appellant's ceiling price for the sale of said services was the highest price charged for such services during the base period, and that Appellant's ceiling price was fixed by the said regulation at the sum of Five (5¢) Cents for the playing of each record in such coin-operated machines, and that the Appellant during the period from September 1, 1951 to May 5, 1952, sold such services at a price in excess of the alleged ceiling prices, and as a result of such overcharges received the total amount of Twenty Five Thousand Nine Hundred Fifty Six and 20/100 ($25,-956.20) Dollars, and that the United States of America was entitled to judgment for treble damages.

Appellant, Clifford G. Martin, as defendant, contended by his pleadings and the Pre-Trial Order that Ceiling Price Regulation 34 did not apply to him, in that the prices charged by him were specifically exempt from the application of the regulation.

The cause was submitted to the trial court for determination without trial or oral argument on an agreed statement of fact set forth in the Pre-Trial Order.

The trial court found that, inasmuch as the Appellant received one One-half (½) of the gross income from the operation of his machines, he was liable for only the actual amount charged and received by him in

excess of the amount that he would have charged and received calculated at Five (5¢) Cents per play. Judgment was entered against the Appellant in the amount of Twelve Thousand Nine Hundred Seventy Eight and 10/100 ($12,978.10) Dollars.

STATEMENT OF THE CASE

The Appellant has filed herein his Statement of Points on which he intends to rely on appeal. The Appellant does not waive any of the points raised therein. In this brief the Appellant will only argue the points more specifically hereinafter referred to, but he is not waiving nor abandoning any of the other points raised in his Statement of Points on which he intends to rely on appeal.

The facts involved in this appeal are those referred to above in the Statement of Pleadings. The issues involved are:

1. Was Appellant's business specifically exempted from the application of Ceiling Price Regulation 34 by the provisions of said regulation?

2. If not, was Appellant specifically exempted from the application of Ceiling Price Regulation 34 by the provisions of General Overriding Regulation 14?

SPECIFICATION OF MAJOR GROUNDS WHEREIN JUDGMENT IS ERRONEOUS AND SHOULD BE REVERSED

Appellant claims there are two major reasons why the judgment against him is erroneous and should be reversed. These, in the order of their presentation and argument, are:

The Trial Court erred in failing to find that:

1. The Appellant's business is specifically exempted from the application of Ceiling Price Regulation 34 by the provisions of the said regulation.

2. If the prices for furnishing music by means of coin-operated machines were within the contemplation of the General Ceiling Price Regulation and of Ceiling Price Regulation 34, the said prices and such services were exempted from the provisions of the said regulation by General Overriding Regulation 14.

1.

The Defendant's business is specifically exempted from the application of Ceiling Price Regulation 34 by the provisions of the said regulation.

The General Ceiling Price Regulation (GCPR) provides in part as follows:

Sec. 14 (16 Fed. Reg. 814, as amended, 32A C.F.R. 1460):

excess of the amount that he would have charged and received calculated at Five (5¢) Cents per play. Judgment was entered against the Appellant in the amount of Twelve Thousand Nine Hundred Seventy Eight and 10/100 ($12,978.10) Dollars.

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2. If not, was Appellant specifically exempted from the application of Ceiling Price Regulation 34 by the provisions of General Overriding Regulation 14?

SPECIFICATION OF MAJOR GROUNDS WHEREIN JUDGMENT IS ERRONEOUS AND SHOULD BE REVERSED

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1.

The Defendant's business is specifically exempted from the application of Ceiling Price Regulation 34 by the provisions of the said regulation.

The General Ceiling Price Regulation (GCPR) provides in part as follows:

Sec. 14 (16 Fed. Reg. 814, as amended, 32A C.F.R. 1460):

"*Exemptions and Exceptions.* This regulation does not apply to the following:

. . . . .

(c) Prices or rentals for:

(1) Materials furnished for publication by any press association or feature service; . . ."

In effect GCPR provides that there shall be no regulation of prices charged by any "feature service" for materials furnished by it for "publication". Appellant will show that his business was at all times with which we are here concerned a "feature service", which furnished materials for "publication" within the contemplation of the Regulation, and that, therefore, his business was specifically exempted from the application of the price regulations.

In Webster's New International Dictionary (2d Ed., Unabridged, 1950), "publication" is defined at page 2005 as follows:

"1. Act of publishing, or state of being published; public notification, whether oral, written, or printed . . . ."

Obviously the word "publication", as used in GCPR, means neither more nor less than the generally accepted definition of the word. In this sense and in the obvious meaning of the regulation, "publication" must be defined in the manner in which it is defined in standard dictionaries of the English language. As so defined, "publication" must refer to a presentation or distribution of material to the public, whether the presentation is through written, printed or oral media. Any definition of the word "publication", which does not give it a

sensible meaning in its application to modern inventions and to modern usage would be clearly arbitrary and contrary to the purpose and intent of the GCPR.

Appellant's business is a "feature service" within the meaning of GCPR. For Appellant's business to succeed, he must cater to the whims and fancies of the public in selecting recordings which are then in public favor. If he fails to feature the so-called "hit tunes" of the day, or if he wrongly gages the public's demands, his business is doomed to failure. From the very nature of the service rendered by Appellant, it is a "feature service".

The characteristics which make Appellant's business a "feature service" are apparent. Appellant must first select and obtain locations at which to install his coin-operated music machines. Thereafter he must exhibit those recordings which will be particularly attractive to the patrons of each location, replace recordings as they wear out or break, substitute recordings for those which have ceased to be attractive to the public, and perform a myriad of other services in order to make his operation successful.

Webster's New International Dictionary at page 927 defines "feature" as follows:

> "6. *U. S.* Anything in an offering to the public or a clientele which is exhibited or advertised as particularly attractive. . . ."

There are in this country many businesses which come within the meaning of the term "feature services". Examples are syndicated columns and specialty features for radio and television programs. The exhibition of

current popular musical hits in the countless coin-operated music machines throughout the country is also a "feature service". Appellant selected from a large number of possible offerings a comparatively few recordings that he exhibited as particularly attractive. The business conducted by the Appellant fits squarely within Webster's definition of the word "feature".

That Appellant's business is a "service" business within the meaning of the regulation must be conceded, for the regulation pursuant to which the action was brought against the Appellant was applicable only to the sales of services.

Appellant's business was thus specifically exempted from the application of the GCPR, because the prices charged by him were "prices . . . for materials furnished for publication by any . . . feature service."

Appellant was specifically charged in the Complaint in this action with a violation of Ceiling Price Regulation 34 (CPR 34), Section 2 of which (16 Fed. Reg. 4447, 32A C.F.R. 732) provides as follows:

> "*Services covered.* This regulation covers all services except:
>
> (a) Services exempted in the GCPR, as amended; . . ."

By its express provisions, CPR 34 specifically exempted from its application all services exempted in the GCPR. Therefore, the prices charged by Appellant for his services, being exempted in the GCPR, were specifically exempted from the application of CPR 34, pursuant to which this action against the Appellant was brought and the judgment appealed from obtained.

2.

If the prices for furnishing music by means of coin-operated machines were within the contemplation of the General Ceiling Price Regulation and of Ceiling Price Regulation 34, the said prices and such services were exempted from the provisions of the said regulations by General Overriding Regulation 14.

In its General Overriding Regulation 14 (GOR 14), 16 Fed. Reg. 6664, as amended 32A C.F.R. 1656 (1951), the Office of Price Stabilization (OPS) specifically exempted the services performed and prices charged by Appellant from the application of CPR 34. GOR 14 adopted July 9, 1951 by the OPS provided, in pertinent part, as follows:

> "Sec. 3. *Exceptions.* (a) No ceiling price regulation now or hereafter issued by the Office of Price Stabilization shall apply to the rates, fees and charges for the supply of the services listed below and the services which fall within the scope of the occupations or categories listed below:
>
> . . . . .
>
> (2) Actors and actresses . . .
> (5) Artists.
> (6) Athletes . . .
> (23) Entertainers . . .
> (39) Musicians . . .
> (51) Program elements (package productions) furnished by independent contractors (package producers) for use in radio or television broadcasting or in a motion picture, theatre, or night club . . .
> (54) Sports officials . . .
> (77) Managers of actors, actresses and athletes . . . "

It is apparent that OPS in adopting GOR 14 intended to and did specifically exempt from the application of CPR 34 all entertainers. In addition to listing many specific facets of the entertainment industry (e.g., actors, actresses, artists, athletes, etc.) GOR 14, Sec. 3 (a) (23) specifically included the catch-all term "entertainers". There can be no doubt that the Appellant's services fell directly within the scope of the occupation or category listed in GOR 14 as "entertainers".

The "juke-box" industry provides entertainment for countless numbers of the American public through the location of juke-box outlets in restaurants, cafes and other places patronized by the public throughout the many cities, towns, hamlets, villages in this county. It would be difficult to find many areas in the United States which are not serviced by this form of entertainment.

The Congress of the United States has clearly recognized that furnishing music by means of coin-operated machines constitutes "entertainment". The language of Section 4232 (b) of the Internal Revenue Code of 1954 contains the following:

> "The term 'roof garden, cabaret, or other similar place,' . . . shall include any room in any hotel, restaurant, hall, or other public place where music and dancing privileges *or any other entertainment, except instrumental or mechanical music alone,* are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise . . ." (Emphasis supplied)

No explanation for the use of the words "mechanical music" in the context of that statute can reasonably be

made other than that Congress regarded the playing of mechanical music in cafes, restaurants and other public places as "entertainment".

In Webster's New International Dictionary, at page 853, the word "entertainer" is defined as follows:

> "One who or that which entertains; specif., one who gives professional entertainments."

and the word "entertainment" is defined as follows:

> "3. That which entertains, or with which one is entertained; as . . . b. That which engages the attention agreeably, amuses, or diverts, whether in private . . . or in public."

and the word "entertain" is defined as follows:

> "5. To engage the attention of agreeably; to amuse with that which makes the time pass pleasantly; to divert."

That the service furnished by Appellant is one which "engages the attention" of the public "agreeably" and "amuses" the public "with that which makes the time pass pleasantly" can not be controverted.

That the Appellant is one who furnishes "professional entertainments" seems too clear to provoke much argument. In Webster's New International Dictionary, at page 1976, the word "professional" is defined as follows:

> "3A. Engaging for livelihood or gain in an activity . . ."

Clearly the Appellant is "one who entertains", and his business is "that which entertains", and he is, specifically, "one who gives professional entertainment".

The Appellant was an "entertainer", as defined by standard dictionaries and he furnished "entertainment", as that word is defined by dictionaries and used by Congress.

The fact that GOR 14 did not specifically list the service supplied by the Appellant by name is immaterial. Among the entertainment industry only a few specific forms of entertainment and entertainers were specifically mentioned in the regulation. Had the Office of Price Stabilization intended to limit the exception to those few, it surely would not have included the word "entertainers". To the contrary OPS must have intended to exempt the large number of entertainers whose many particular specialties were too numerous to specifically list.

To quote only the pertinent language of GOR 14, it reads as follows:

> "No ceiling price regulation . . . shall apply to the rates, fees and charges for the supply of services which fall within the scope of the occupations or categories listed . . . [as] entertainers."

The service supplied by the Appellant falls within the scope of the occupation or category listed as "entertainers." The Appellant is an entertainer within the scope of the occupations or categories to which the word refers. To hold otherwise would be to distort the English language to the prejudice of the Appellant and to arrive at a result obviously not intended by the regulation.

The Appellant is not urging the invalidity of any specific regulation. To the contrary the Appellant is urg-

ing that the very regulation which he has been accused of violating specifically exempted him from the application of the Price Control Regulations.

As an "entertainer" the Appellant was specifically exempted by GOR 14 from the application of Ceiling Price Regulation 34.

CONCLUSION

Appellant believes that he has shown that under the applicable regulations:

(1) Appellant's business was a "feature service" furnishing materials "for publication" and, as such, was exempted from regulation under the General Ceiling Price Regulation and under Ceiling Price Regulation 34.

(2) The fees and charges made by Appellant for services supplied as an entertainer furnishing music by means of coin-operated machines for the entertainment of patrons of public places was specifically exempted from the provisions of Ceiling Price Regulation 34 by General Overriding Regulation 14.

THEREFORE, the Judgment of the Trial Court being contrary to the law should be reversed.

Respectfully submitted,

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By .....
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